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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 92

UNITED STATES OF AMERICA, PETITIONER

vs.

CITY OF NEW BRITAIN, CONNECTICUT, ET AL.,
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Errors of Connecticut (R. 17-23) is reported in 139 Conn. 363, 94 A. (2d) 10.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioner's Brief.

QUESTIONS PRESENTED

The Supreme Court of Errors of Connecticut has construed Sec. 3672 of the Internal Revenue Code as expressing an intention that Federal liens should be subordinated to such mortgages and judgment liens as are

described therein and, consequently, subordinated to such other encumbrances as have priorities over those mortgages and judgment liens. The question is:

Whether the Federal tax lien, admittedly subordinate to two mortgages and a judgment lien, (Sec. 3672 of the Internal Revenue Code) is superior to municipal tax liens, which are superior to the said mortgages and judgment lien by state law.

STATUTES INVOLVED

The pertinent portion of the statutes involved are set forth in the Petitioner's Brief at "Appendix".

SUMMARY OF ARGUMENT

The distinguishing feature of the cases relied on by the United States is that they are all within the purview of *Sec.* 3466, *Rev. Stat.* (1875), 31 *U. S. C. Sec.* 191 (1946). In the instant case *Secs.* 3670-3672 *Int. Rev. Code* pertains. 26 *U. S. C. Secs.* 3670-3672 (1946). There is no other pertinent legislation.

The United States has no lien rights excepting those created by statute. *Equitable Trust vs. Connecticut Brass & Mfg. Corp.* 290 *F.* 712, 719.

The assumption that the Congress intended to create the so-called circular priority claimed by the United States can hardly be maintained. This anomaly occurs when there is a departure from the rule "first in time, first in right". The United States claim of priority over the general and inchoate lien should allow for subordina-

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tion, on the same grounds, of its own lien to one who has perfected his right. Legislation contemporary to the Internal Revenue Statutes by which the United States makes its claims, indicates the variance between the intent of Congress and the interpretation of the Supreme Court.

Congress has never enunciated a federal lien priority over senior liens. The petitioner should work for clarity in legislation rather than strive for court interpretations based on the innate superiority of its position.

ARGUMENT

The enforcement of the United States tax lien is frequently complicated by the fact that there are other creditors with liens. Protection of this federal lien, if extended too far, threatens the security of commercial transactions. Also, other taxing authorities are adversely affected.

The federal taxing power is, without question, supreme. However, if federal tax legislation contemplates continuation of the federal system, this power must be exercised by comety and amicable adjustment, rather than harsh decree from the admittedly superior position. Or, Congress must concern itself immediately with stated limits to the use of the federal power, at least in cases affecting lesser municipalities.

This case presents an opportunity for the United States Supreme Court to rule with consideration for the liens recognized in the State of Connecticut. There is no insolvency here and Sec. 3466, the basis for the decisions favorable to the United States, need not be applied.

The distinguishing feature of the cases relied on by the United States is that they are all within the purview of this Sec. 3466 of the Internal Revenue Code. This section provides that whenever the party indebted to the United States is insolvent, the government shall have priority. It does not apply where the taxpayer has not been so adjudged. *Equitable Trust Co. v. Connecticut Brass & Mfg. Corp.* 290 *F* 712, 719.

It would be interesting to get an elaboration of the dissenting opinion in the Gilbert Associates case. *Vol.* 97, *No.* 11*L ed.* (*Adv. Rep.*)

"(B)y a comparatively slight change of the statute law the rights of the United States could be sufficiently protected without endangering the interests of other persons". *United States vs. Curry* 201 *F.* 371, 374.

In the instant case *Secs.* 3670-3672 *Internal Revenue Code* pertain. There is no other pertinent legislation. These sections provide that the tax due the United States shall be a lien upon the debtor's property, this lien arising "at the time the assessment list was received by the collector" and continuing until the tax is paid or becomes unenforceable. Sec. 3672 allows priorities to mortgagees, pledgees, purchasers and judgment creditors, when the liens antedate the United States liens.

Although it is said that "consistency is a lost jewel in government", *in re Wilson* 23 *F. Supp.* 236, 239, it would seem to be elementary justice that the United States, claiming priority over the general and inchoate lien should allow for subordination, on the same grounds, of its own lien as

against one who has perfected his right. Unless, of course, the federal statute treats the federal liens specially or preferentially. Certainly, the logic of the lower court in cases such as the matter at hand, is difficult to reject.

It is also interesting to note the application of the federal statutes in the decisions of the United States Supreme Court. An illuminating and dramatic example may be seen in the statutory lien for delinquent taxes on distilled spirits. *Rev. Stat. Sec.* 3251 (1875). (Sec. 3670 was derived from contemporaneous legislation.) Congress provided that no performance bond of a distillery should be approved "unless he is the owner in fee, unincumbered by any mortgage, judgment, or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the collector · · · the written consent of the owner of the fee, and of any mortgagee, judgment creditor, or other person having a lien thereon, duly acknowledged, · · · expressly stipulating that the lien of the United States for taxes and penalties shall have priority · · · and that in the case of the forfeiture of the distillery property · · · the title of the same shall vest in the United States discharged from such · · · incumbrance."

These precautions would hardly be necessary to protect the United States if the Congress intended what the United States Supreme Court assumes.

Attention is also brought to 95 *U. of Pa. L. Rev.* 739, 748 (1947) in which lien claimants are considered and Sec. 3678 of the Internal Revenue Code interpreted as clearly stating that they come ahead of the United States.

The United States has no lien rights excepting those created by statute. *Equitable Trust vs. Connecticut Brass & Mfg. Corp.* The Congress not having legislated priority over antedated encumbrances, and having dated a federal lien from the time the collector receives the assessment list, the liens claimed by the United States in this case have no priority. Therefore, the principle of first in time, first in right, applies; *United States vs. Greenville* 118 *F* (2nd) 963, 966. To subordinate prior liens is to extend the general tax lien statute beyond its language and intent.

The assumption that the Congress intended to create the so-called circular priority claimed by the United States can hardly be maintained. A more reasonable interpretation of Sec. 3672 is that if the federal liens are subordinated to the mortgages and liens described in said sections, they are subordinated to such encumbrances as have priority over said described mortgages and liens.

Ferris vs. Chic-Mint Gum Co. 124 *Atl.* 577

Board of Supervisors vs. Hart, 210 *LA.* 78,93: 26 *So.* 2nd 361

Departure from the rule of first in time, first in right, brings forth circuity of priority. The United States has continually pressed for preference in these seemingly anomalous instances, and its success has been an illustrative dramatization of how far afield a judicial determination can go from legislative intent. Chronological order will not allow for this vicious circle. It is simple and basic. Anomalies, destructive of good legal thinking are avoided. The desirability of avoiding such situations was explicitly

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recognized in H. R. Rep. 2320, 82*nd Cong. 2nd. Sess.* 13 (1952)

The argument of the United States in most of the cases similar to this one, should be directed to the Congress. Nowhere has Congress stated a federal tax lien priority superseding senior liens valid and effective under state law. There is no evidence that Congress ever intended any such result. Such an intent might have been shown by protest against numerous cases following after *Spokane County v. United States,* 279 *U. S.* 80. The argument of the United States is based on the snow-balling power in the effectuating of its liens gained through varying court decisions creating jeopardy and dismay in lesser municipalities.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Errors of Connecticut should be affirmed.

Respectfully submitted,

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